Supreme Court, U.S.
FILED
APR 5 2001
CLERK

(3)

No. 00-1039

In The

Supreme Court of the United States

LOUIS SPITALIERI,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORPORATION,

Respondent.

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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ARGUMENT

THE FEDERAL RESPONDENT WRONGLY ARGUES THAT THERE WAS A FINDING OF MISTAKE IN THE DECISIONS BELOW

The Federal Respondent now claims that the administrative law judge found a mistake in finding of fact (brief of Federal Respondent, pg. 10-13). Had the administrative law judge, in fact, found a mistake in finding of fact, then there would have been no appellate proceedings. Before the administrative law judge, the Benefits Review Board, and the circuit court of appeals, both the employer and Federal Respondent argued the issue solely of a "change in conditions" under 33 U.S.C. 922. The injury herein occurred in 1988 and the discussion of the evidence was restricted to the evidence, submitted some years after the original order, in favor of and opposed to a change in conditions (A60-81). A finding of mistake in finding of fact would perforce require an examination of the evidence upon which the original award was based, *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 459 (1968); *Jarka v. Hughes*, 299 F.2d 534, 537 (2nd Cir. 1962). No such examination was undertaken. The only evidence submitted and considered was whether the Employee continued to be disabled. The administrative law judge's comment about mistake in finding of fact (App. 88, footnote 3) is clearly dictum.

In addition, an inquiry into mistake in finding of fact would have required an inquiry as to whether such modification rendered justice under the Act, *O'Keefe v. Aerojet-General Shipyards, Inc.*, cited above; S.Rep.No. 256 588, 73d Cong., 2nd Sess 3-4 (1934); H.R. Rep.No. 1244, 73d

Cong., 2nd Sess., 4 (1934). The underlying difficulty with the position of the Federal Respondent is that it ignores that prior to the 1934 amendments of section 922, when modification was permitted based only on change in conditions, there existed the mandatory language: "Such an order shall not affect any compensation previously paid . . . " There is also ignored the fact that the language permitting retroactive modification of awards was placed into the statute only when the grounds of modification were extended to mistake in finding of fact when such would render justice under the Act and only in precisely delineated situations.

THE FEDERAL RESPONDENT HAS CHANGED ITS POSITION ON THE ISSUE OF DEFERENCE

In the court below, the Director, Office of Workers' Compensation Programs, argued that the circuit court was obliged, by reason of the deference doctrine, to accept its reasonable interpretation of section 922 of the Longshore and Harbor Workers' Compensation Act, an invitation which the second circuit accepted. The Federal Respondent in its reply brief to this Court now argues the more humble standard that its interpretation, formulated during appellate litigation, is entitled to "persuasive force" (brief in opposition pg. 10-11). The Petitioner has no argument with the proposition that this Court should listen respectfully to the interpretation of the administrator of the Longshore Act but that is not the same as deference.

It is incorrect to state that this Court must afford "persuasive force" to the agency's interpretation of the

statute. Relative to statutory interpretation, this Court has stated that the agency's " . . . reasonable interpretation of the Act brings at least some added persuasive force to our [this Court's] conclusion . . . ", *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997). The standard of "persuasive force" applies to an agency's interpretation of its own regulation, specifically an agency's interpretation of its own ambiguous regulation, *Auer v. Robbins*, 519 U.S. 452 (1997). The position now taken by the Solicitor cannot be squared with the willingness of both the second circuit and this Court to disagree with the Director's interpretation of the statute, e.g. *Pitson Stevedore Corp. v. Dellaventura*, 544 F.2d 35 (2nd Cir. 1976), aff'd subsom, *Northeast Marine Terminal, Inc. v. Caputo*, 432 U.S. 249 (1977). The Director, Office of Workers' Compensation Programs is charged with the administration and enforcement of the Longshore Act. However, subsequent to the 1973 amendments of the Longshore Act, the Director has been deprived the adjudicative functions, 33 U.S.C. 919(d). Congress specifically conferred upon the Benefits Review Board and the several circuit courts the review function, including interpretation of the statute, 33 U.S.C. 921(b)(3)&(c). If the Director's opinion is entitled to respectful attention because of his specialized experience in administering claims, is there any reason why the Benefits Review Board is not entitled to have a respectful hearing, based upon its own specialized experience and expertise, relative to its interpretation of the Act? In both cases, the respectful attention to their opinions stands or falls on their own logic when the question presented is the interpretation of an adjudicative provision not requiring rule making for its interpretation or promulgation.

THE FEDERAL RESPONDENT'S INTERPRETATION OF SECTION 922 IS NOT CONSISTENT WITH ITS ACTUAL IMPLEMENTATION

The Federal Respondent now claims that certain cases support its interpretation of section 922, consistent with practice over many years (brief of Federal Respondent pg. 11). It is also argued that section 922's proscription of prior awards being affected applies only when modification is made from the date of accident, and not relative to modification at a later date (*Idem* pg. 12).

The Director, in support of this position, cites the case of *Shahid v. District Utilities Co.*, 17 BRBS 333 (1985) (ALJ). The facts are strikingly similar to the instant case because the prior award of permanent total disability was modified to award a schedule of 50% of the leg with a retroactive modification. However, a close reading of the facts reflect that modification was actually based on a mistake in finding of fact, which would not preclude retroactive modification of the award. Specifically, the administrative law judge noted that the original award of compensation recited that the claimant had been working regularly prior to the award of permanent total disability, 17 BRBS at 335-336. The decision contains no mention of a change in the claimant's conditions but found him partially disabled because the claimant was not working for a "beneficent employer" and there was no evidence that he was working under extraordinary pain or difficulty. Thus, the administrative law judge stated: "Nor is the fact-finder precluded from modifying the previous order on the basis of a mistake in determination of fact when modification was sought only on the basis of a change in the claimant's condition.", *Shahid v. District Utilities Co.*,

cited above at 335 (ALJ). There is recited the case of *Pinizzotto v. Marra Bros., Inc.*, 1 BRBS 241 (1974). A retroactive modification of the award was permitted because modification was based both upon a change in conditions and a mistake in finding of facts, the latter permitting retroactive modification of an award.

Finally, there is cited the case of *Miller v. Sundial Marine Tug & Barge*, 23 BRBS 601 (ALJ) (1990). A prior award of permanent total disability was retroactively modified (to the date of suitable alternative employment) to award continuing payments, at a reduced rate, of permanent partial disability in accordance with 33 U.S.C. 908(c)(21). There is no evidence that the propriety of a retroactive change in benefits was raised or considered and there was no appeal of the decision. Although Petitioner believes the decision is wrong relative to retroactive modification of benefits, at least it is within the literal wording of section 922 permitting such retroactive modification in a new order "decreasing the compensation rate" when compensation is unpaid, 33 U.S.C. 922. In the instant case, there was neither an increase in the rate nor a decrease in the rate because a schedule award for loss of hearing (908(c)(13)(D)) is exactly the same rate as in the case of temporary total disability (908(b) and 908(c)).

The Federal Respondent maintains that the Second circuit holding in *Jarka Corp. v. Hughes*, cited above, supports its position that section 922 permits retroactive modification when an award is modified to the date of accident but not relative to a later date after the compensation order (brief of Federal Respondent pg. 12). In that case the claimant had been paid temporary total disability benefits from November 2, 1948 to May 21, 1951 and

temporary partial benefits to September 22, 1958. The claim for modification was for a finding of permanent total disability. The claimant was found to be permanently and totally disabled with retroactive modification of awards from May 22, 1951, *Jarka v. Hughes*, cited above at 536, fn 1. Thus, the retroactive modification of benefits was not made from the date of the injury. The second circuit remanded the case because it could not determine if the order on modification was based on change in conditions, mistake in fact, or both. The second circuit stated very precisely the requirements of an order for modification based upon a mistake in fact stating: "In order to modify a prior order on the theory of mistake, the new order should make clear that it is doing so, should review the evidence of the first hearing and should indicate in what respect the first order was mistaken." *Jarka Corp. v. Hughes*, cited above at 537. Were a retroactive modification of award at a date subsequent to the original order permissible, there would have been no need for a remand or specific fact-finding as to whether there was a mistake in determination of fact.

Finally, were there any question but that retroactive modification is inapplicable to modification based on change in conditions, this Court's holding in *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995) should lay the matter to rest in *Rambo* the Director, Office of Workers' Compensation Programs was directly involved in the case as it was making payments in accordance with 908(f) of the Act. The facts of that case are that Rambo, after the initial award, retrained himself to work as a crane operator from 1985 through 1990, when modification of the

award was sought. The issue in the case was change in conditions and although Rambo had allegedly been overpaid for a period of approximately five years, the benefits were merely terminated. No suggestion was made for a retroactive modification of the award. Rather, it was recognized, as the statute states, that "such new order shall not affect any compensation previously paid . . . " 33 U.S.C. 922. Any possibility of there being an issue of retroactivity in the case of change in condition, was laid to rest when the matter again appeared before this Court in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997). (Rambo II). On remand the court of appeals had directed a *de minimis* award, *Rambo v. Director, OWCP*, 81 F.3d 840 (9th Cir. 1996). This Court affirmed the propriety of the *de minimis* award but remanded the matter for additional fact-finding. Clearly, such an award would represent "an award decreasing the compensation rate", 33 U.S.C. 922. Nevertheless, neither the ninth circuit nor this Court ever suggested that a retroactive modification of the award and credit against the reduced rate of compensation to be appropriate.

The underlying difficulty with the interpretation advanced by the Respondents herein is that it would permit, in a discretion of the fact-finder, retroactive modification of awards in all circumstances. This flies in the face of the mandatory language of the section 922 that "such order shall not affect any compensation previously paid . . . " except for the case of an increase in the

compensation rate or a decrease in the compensation rate and some compensation remains unpaid.

CONCLUSION

For the foregoing reasons, this Court should reject the arguments set forth by Federal Respondent and grant Louis Spitalieri's Petition for a Writ of Certiorari.

Respectfully submitted,

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